

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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GERALD and DONNA ERICKSON,

Plaintiffs,

v.

PNC MORTGAGE; et al.,

Defendants.

3:10-cv-0678-LRH-VPC

ORDER

Before the court is defendants PNC Mortgage (“PNC”) and the Federal Home Loan Mortgage Corporation’s (“Freddie Mac”) (collectively “defendants”) motion to dismiss the amended complaint. Doc. #39.<sup>1</sup> Plaintiffs Gerald and Donna Erickson (“the Ericksons”) filed an opposition (Doc. #45) to which defendants replied (Doc. #49).

**I. Facts and Procedural History**

In January, 2005, the Ericksons purchased real property through a mortgage note and deed of trust executed by defendant non-party Accubanc Mortgage. Eventually, the Ericksons defaulted on the mortgage note and defendants initiated non-judicial foreclosure proceedings.

Subsequently, the Ericksons filed a complaint in state court against defendants. Doc. #1, Exhibit A. Defendants removed the action to federal court (Doc. #1) and the Ericksons filed an

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<sup>1</sup> Refers to the court’s docket entry number.

1 amended complaint (Doc. #26, Exhibit 1). The amended complaint alleges eight causes of action  
 2 against defendants: (1) declaratory relief; (2) wrongful foreclosure; (3) contractual breach of the  
 3 duty of good faith and fair dealing; (4) tortious breach of the duty of good faith and fair dealing;  
 4 (5) violation of NRS 649 (debt collection violations); (6) violation of the Fair Debt Collection  
 5 Practices Act (“FDCPA”); (7) unfair and deceptive trade practices; and (8) violation of the Truth in  
 6 Lending Act (“TILA”). Doc. #26, Exhibit 1. Thereafter, defendants filed the present motion to  
 7 dismiss claims one (1) through four (4), seven (7),<sup>2</sup> and eight (8) from the amended complaint.<sup>3</sup>  
 8 Doc. #39.

## 9 **II. Legal Standard**

10 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure  
 11 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state  
 12 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
 13 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
 14 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is  
 15 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
 16 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a  
 17 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.  
 18 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

19 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
 20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
 21 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
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23 <sup>2</sup> The Ericksons concede in their opposition that claim seven (7) for unfair and deceptive trade practices  
 24 is not directed at moving defendants. *See* Doc. #45 (“Claim 7 asks for nothing from PNC, though it is  
 25 mistakenly listed in the subheading of that paragraph.”). Accordingly, the court shall grant defendants’ motion  
 26 to dismiss as to this claim.

<sup>3</sup> Defendants are not alleged to have violated the Fifth and Sixth causes of action which relate to the  
 Fair Debt Collection Practices Act. *See* Doc. #26, Exhibit 1.

1 the court to draw the reasonable inference, based on the court's judicial experience and common  
 2 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. "The plausibility  
 3 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
 4 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
 5 defendant's liability, it stops short of the line between possibility and plausibility of entitlement to  
 6 relief." *Id.* at 1949 (internal quotation marks and citation omitted).

7 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
 8 true. *Id.* However, "bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
 9 the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret*  
 10 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
 11 (internal quotation marks omitted). The court discounts these allegations because "they do nothing  
 12 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
 13 allegation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) "In sum, for a complaint to survive a motion to  
 14 dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be  
 15 plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

### 16 **III. Discussion**

#### 17 **A. Wrongful Foreclosure**

18 An action for wrongful foreclosure requires that, at the time of the foreclosure sale, the  
 19 plaintiff was not in breach of the mortgage contract. *Collins v. Union Federal Sav. & Loan Ass'n*,  
 20 662 P.2d 610, 623 (Nev. 1983). Here, the Ericksons were in default on their mortgage obligations  
 21 so there can be no sustainable action for wrongful foreclosure.

#### 22 **B. Breach of Good Faith and Fair Dealing**

23 Under Nevada law, "[e]very contract imposes upon each party a duty of good faith  
 24 and fair dealing in its performance and execution." *A.C. Shaw Constr. v. Washoe County*, 784  
 25 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for  
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1 breach of the implied covenants of good faith and fair dealing, a plaintiff must show that: (1) the  
2 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and  
3 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
4 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.  
5 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*  
6 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

7 Here, the Ericksons allege that they entered into a trial modification agreement with PNC,  
8 made the necessary trial payments, and were foreclosed upon despite specific language in the  
9 modification agreement to the contrary. The court has reviewed the allegations in the complaint and  
10 finds that the Ericksons have sufficiently alleged a claim for breach of the covenants of good faith  
11 and fair dealing based on the trial modification agreement. Accordingly, the court shall deny  
12 defendants' motion as to this issue.

### 13 **C. Breach of Fiduciary Duty**

14 The Ericksons allege that PNC breached its fiduciary duties in dealing with them during the  
15 trial modification process. Generally, a loan servicer does not owe a borrower a fiduciary duty. *See*  
16 *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, 359 F.Supp.2d 1075, 1092 (D. Nev.  
17 2004). Absent a duty, there can be no breach. *See A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9,  
18 10 (Nev. 1989). Because the Ericksons have failed to allege sufficient facts to establish that PNC  
19 acted outside its capacity as a loan servicer, which does not, in itself, create a fiduciary relationship,  
20 the Ericksons' claim for breach of a fiduciary duty fails to state a claim upon which relief can be  
21 granted.

### 22 **D. Truth in Lending Act**

23 Pursuant to the Truth in Lending Act ("TILA"), "upon written request by the obligor, the  
24 servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address,  
25 and telephone number of the owner of the obligation or the master servicer of the obligation."  
26

1 15 U.S.C. § 1642(f)(2).

2 In their complaint, the Ericksons allege that they sent an appropriate written request to PNC  
3 to determine who owned their mortgage note and deed of trust under TILA and that they did not  
4 receive an appropriate response in return. The court has reviewed the allegations in the complaint  
5 and finds that these allegations are sufficient to state a claim for violation of TILA. Accordingly,  
6 the court shall deny defendants' motion to dismiss as to this issue.

7 **E. Declaratory Relief<sup>4</sup>**

8 A claim for declaratory relief is a remedy that may be afforded to a party after he has  
9 sufficiently established and proven his claims; it is not a separate cause of action. *See e.g., In re*  
10 *Wal-Mart & Hour Employment Practices Litig.*, 490 F. Supp. 1091, 1130 (D. Nev. 2007). Here, the  
11 Ericksons don't allege any specific claim for relief against defendant Freddie Mac. Accordingly, the  
12 Ericksons are not entitled to declaratory relief.

13  
14 IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #39) is  
15 GRANTED in-part and DENIED in-part. Defendant PNC Mortgage is DISMISSED as a defendant  
16 from plaintiff's second cause of action for wrongful foreclosure; fourth cause of action for tortious  
17 breach of the duty of good faith and fair dealing; and seventh cause of action for unfair and  
18 deceptive trade practices. Defendant the Federal Home Loan Mortgage Corporation is DISMISSED  
19 as a defendant in this action.

20 IT IS SO ORDERED.

21 DATED this 6th day of May, 2011.



22  
23 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE

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26 <sup>4</sup> The Ericksons' first claim for declaratory relief is solely against defendant Freddie Mac. PNC is not  
a defendant to this claim.